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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER GARCIA,

Defendant and Appellant.

D074621

(Super. Ct. No. JCF000742)

APPEAL from a judgment of the Superior Court of Imperial County, L. Brooks Anderholt, Judge. Affirmed.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

As the sole issue on appeal, Alexander Garcia contends the court's imposition of minimum statutory restitution fines and fees, amounting to \$370, without conducting a hearing about his ability to pay violated his state and federal constitutional due process

rights based on the recent case of *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1160, 1169–1173 (*Dueñas*). While this appeal was pending, the trial court denied Garcia's informal motion in the trial court for correction of the fines and fees.<sup>1</sup> Therefore, this issue is cognizable on appeal under Penal Code<sup>2</sup> section 1237.2. Assuming without deciding there was error and Garcia did not forfeit the error by failing to object, we conclude any error was harmless because the record before us indicates Garcia is able to pay the minimal fines and fees at issue here considering his potential to earn wages during his incarceration and thereafter.

## BACKGROUND

A state prison corrections officer discovered an inmate-manufactured syringe, used to inject drugs hidden in the waistband area of Garcia's boxers during a clothed body search in August 2017. A jury convicted Garcia of possession of drug paraphernalia in a state prison. (§ 4573.6, subd. (a); count 1.) In a bifurcated proceeding, the jury found true an allegation Garcia had a prior strike conviction for robbery. (§§ 211, 667, subd. (b)–(i), 1170.12, subd. (a)–(d).)

The court sentenced Garcia to the low term of two years, which was doubled for the strike, for a total term of four years in state prison. The court ordered the prison term to be served consecutive to the term he was serving for the prior strike (San Diego Super. Ct. No. SCD245123-A).

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<sup>1</sup> Garcia's unopposed March 26, 2019 request for judicial notice of the trial court's March 18, 2019 order is granted.

<sup>2</sup> Further statutory references are to the Penal Code unless otherwise stated.

The court imposed the minimum felony restitution fine of \$300 (§ 1202.4) and a corresponding \$300 parole revocation restitution fine (§ 1202.45), which was suspended unless Garcia is placed on parole and parole is revoked. The court also imposed a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 criminal conviction assessment (Gov. Code, § 70373). Garcia's counsel did not object to the fines or fees.

### DISCUSSION

*Dueñas, supra*, 30 Cal.App.5th 1157, involved an indigent, disabled, and homeless mother of young children who, due to her illness, did not complete high school and was unemployed. After she was unable to pay fees assessed for juvenile citations incurred when she was a teenager, her driver's license was suspended. Over the years, Dueñas became embroiled in a cycle of incurring misdemeanor convictions for driving with a suspended license and serving additional jail time because she was unable to pay related fines. When she remained unable to pay related court fees, those debts were sent to collections. (*Id.* at pp. 1160–1161.)

After Dueñas pleaded no contest to another charge of misdemeanor driving with a suspended license, she was placed on probation on the condition she serve 30 days in county jail and pay another \$300 fine plus a penalty and assessment or serve an additional nine days in jail. The court also imposed a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and a \$150 restitution fine (§ 1202.4). The court imposed but stayed a probation revocation restitution fine (§ 1202.45). (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas objected and asked the court to conduct a hearing about her ability to pay. The court

concluded the court fees were mandatory despite an inability to pay and Dueñas had not shown "compelling and extraordinary reasons" to justify waiving the \$150 restitution fine under section 1202.4, subdivision (c). (*Dueñas* at pp. 1162–1163.)

The appellate court reversed the assessments concluding "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) The court remanded the matter to the trial court concluding although "section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*; see *id.* at pp. 1172–1173.)

There is a split of authority regarding whether forfeiture applies to cases where a defendant failed to object to the imposition of fines and fees before *Dueñas* was decided. (Compare *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1154 [forfeiture found for restitution fines and fees in excess of statutory minimum] and *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032–1033 [same] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [court declined to find forfeiture for minimum fines and fees] and *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*) [same].)

Although the *Johnson* court declined to find forfeiture, it affirmed the judgment concluding that even if it was error to impose fees without an ability to pay hearing, the error was harmless. Unlike in *Dueñas*, there was evidence in the record Johnson had

some financial means and past income-earning capacity as well an ability to earn prison wages over a sustained period. (*Johnson, supra*, 35 Cal.App.5th at pp. 139–140.)

Similarly, the court in *People v. Jones* (2019) 36 Cal.App.5th 1028, petition for review pending, petition filed July 31, 2019, S257187 (*Jones*) concluded any *Dueñas* error was harmless because the ability to earn prison wages foreclosed an ability to pay argument. (*Id.* at pp. 1035–1036.)

We need not express an opinion on whether *Dueñas* was correctly decided or enter the fray about forfeiture in this case. Assuming, without deciding, there was error and Garcia did not forfeit the error by failing to object to the minimum fines and fees imposed, we conclude the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].)

Unlike *Dueñas*, Garcia is a young man in his mid-twenties with no evidence of physical disability. He reported to the probation officer he was only eight credits shy of completing the 12th grade and had some history of employment in restaurants as a dishwasher and a cook.

Garcia was serving a six-year prison term for two prior robbery convictions at the time of the current offense, for which he was sentenced to four more years. According to evidence presented to the trial court, Garcia's extensive disciplinary history in prison includes failure to report to work assignments or classes, along with failure to obey orders, striking other inmates, possession of contraband, refusing to provide urine samples for drug testing, and testing positive for illegal drugs. However, at his sentencing hearing, Garcia's counsel represented Garcia had completed a drug treatment

program, was making an effort to beat his drug habit, and was preparing to integrate into society.

Based on this record, there is evidence Garcia has the opportunity and ability to earn prison wages during his incarceration as well as the potential for employment after his release. This forecloses any inability-to-pay argument for the minimal fines and fees imposed in this case and renders any error harmless. (*Jones, supra*, 36 Cal.App.5th at p. 1035; *Johnson, supra*, 35 Cal.App.5th at pp. 139–140; see *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [court may consider a defendant's future ability to pay restitution].)

#### DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.